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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma, Division Four

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney, against whom sanctions have been imposed in a civil case, has been denied the constitutional requirement of a neutral adjudicator when the judge imposing the sanctions had previously determined essential issues of law directly related to the sanctions hearing.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Bill V. Wilkinson and Wilkinson & Monaghan, Inc.; the respondents, Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., South Utica Pathology Laboratories, Inc., and Frederick Jones, M.D., Gary Breipohl, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Dan Wiesemeyer, M.D., and Duane Brothers, M.D.

Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer and Brothers ("Anesthesiology defendants") have not been joined as respondents in this proceeding because petitioners believe they have no interest in its outcome.

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Wilkinson and Monaghan and Bill V. Wilkinson (hereinafter "Petitioners") pray that a writ of certiorari issue to the Court of Appeals of the State of Oklahoma, Division Four, affirming in part sanctions imposed on petitioner pursuant to an Oklahoma statute, OKLA. STAT. tit. 12 §2011 (1991), while refusing to review an essential conclusion of law made by the trial court in imposing those sanctions, even though the trial court's conclusion had already been determined, prior to petitioners' sanctions hearing. The Oklahoma Supreme Court denied the petition for a writ of certiorari on this issue.

OPINIONS BELOW

The findings of fact and conclusions of law of the Honorable David L. Peterson, District Court of Tulsa County, Oklahoma, made in this case, appear in the Appendix, at APP. 32a-44a.[1] The opinion of the Court of Appeals of the State of Oklahoma, Division Four, in this case appears at APP. 1a-31a. The order of the Oklahoma

[1] References to the Appendix, infra, will be signaled as APP.___. References to the record before the District Court of Tulsa County will be signaled T.C. APP.___ and references to the record below before the Oklahoma Supreme Court and the Oklahoma Court of Appeals will be described by document title and filing date.

Supreme Court denying the petition for a writ of certiorari appears at APP. 58a-59a.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. amend. XIV, §1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves OKLA. STAT. tit. 12 §2011 (1991) which provides:

> SIGNING OF PLEADINGS.
>
> A. SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in his individual name, whose Oklahoma Bar Association identification number shall be stated, or, if the party is not represented by an attorney, shall be signed

by the party. Each paper shall state the address of the signer and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless the omission of the signature is corrected promptly after being called to the attention of the attorney or party.

B. REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. It is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;

2. The claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and,

4. The denials of factual contentions are warranted on the evidence or, if specifically

so identified, are reasonably based upon a lack of information or belief.

C. SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subsection B of this section has been violated, the court shall, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subsection B of this section or are responsible for the violation.

1. HOW INITIATED.

a. By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection B of this section. It shall be served as provided in §2005 of this title, but shall not be filed with or presented to the court unless, within twenty-one (21) days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

b. On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that

appears to violate subsection B of this section and directing an attorney, law firm or party to show cause why it has not violated subsection B of this section with respect thereto.

2. NATURE OF SANCTIONS; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs a and b of this paragraph, the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

a. Monetary sanctions shall not be awarded against a represented party for a violation of paragraph 2 of subsection B of this section.

b. Monetary sanctions shall not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

3. ORDER. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

D. INAPPLICABILITY TO DISCOVERY. This section does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Sections 3226 through 3227 of this title.

STATEMENT OF THE CASE

This case presents an important issue of procedural due process. That is, whether procedural due process, guaranteed by section 1 of the Fourteenth Amendment, is violated when sanctions are imposed on an attorney in a hearing before which the presiding state judge had already predetermined dispositive legal issues directly relating to the sanctions, thereby denying the attorney a neutral adjudicator.

Petitioner Bill V. Wilkinson is a member in good standing of the Oklahoma Bar and this Court. He is a member of petitioner law firm, Wilkinson & Monaghan, Inc., in Tulsa, Oklahoma.

Petitioners were retained by the personal representatives of the estate of Norma Levitt to pursue a medical malpractice claim. Mrs. Levitt died on the operating table while a patient at the Hillcrest Medical Center, Inc., in Tulsa following hip replacement surgery. The surgery was successful with no complications. After the completion of the surgery, however, a nurse determined that the patient should receive a blood transfusion and prior to the transfusion the blood was improperly heated in a conventional microwave oven located in the employee lounge. Such heating caused the blood to become toxic and the patient

died immediately after having received the blood. After more than three years of discovery, pretrial dispositive motions were filed by all defendants and the trial court denied the motions. A lengthy jury trial was held during which the trial judge made important evidentiary rulings. Plaintiff rested after seventeen days of trial. At that point, the trial court sustained demurrers on behalf of many of the defendants, including Hillcrest Healthcare Corporation, Hillcrest Real Estate Corporation, Hillcrest Medical Center Foundation, and Hillcrest Service Company ("Hillcrest defendants"), Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., South Utica Pathology Laboratories, Inc. ("Pathologist defendants"). The case was submitted to the jury against several other defendants, including Hillcrest Medical Center, Inc. The jury returned a verdict for the defendants. Petitioners then filed a motion for a new trial. However, by that time the estate had chosen to retain other counsel, who proceeded to settle the case with those defendants who prevailed before the jury, in exchange for foregoing an appeal.

Following the confidential settlement, the Hillcrest defendants and the Pathologist defendants sought sanctions against petitioners, alleging violations of OKLA. STAT. tit. 12 §2011 (1991). These defendants asserted that petitioners had violated §2011, either by improperly naming them in the lawsuit without any basis in law or fact or, assuming such a basis did exist, by failing to develop sufficient evidence to maintain a cause of action, at which point petitioners had the obligation to dismiss them from the suit. Relevant for purposes of this petition is the claim for sanctions due to petitioners' inclusion of the Hillcrest

defendants other than the Medical Center, Inc., even though they possessed distinct corporate identities. Petitioners' theory in naming these defendants was that they were the alter ego corporations of the Hillcrest Medical Center, Inc., established to receive assets diverted to them by the Center. At the trial, petitioners presented an expert witness, Dr. Wright, a highly qualified and experienced hospital administrator, who testified that there was "commonality" of personnel between the boards of directors of the various Hillcrest defendants. However, the trial court, over petitioners' objection, refused to allow the witness to testify further. (T.C. APP. 10,067 at pp. 3036-3037). Petitioners have contended throughout that had Dr. Wright been permitted to testify, at the very least the claims against the other Hillcrest defendants would have been submitted to the jury. (T.C. APP. 8225 at 8227; T.C. APP. 10,195 at 358; Petition in Error, Exhibit C thereto, ¶ 18, filed 5/11/94; Brief in Chief, p. 16, filed 12/23/94; Reply Brief, p. 13, filed 3/23/95; Petition for Rehearing, pp. 11-12, filed 10/16/95; Petition for Certiorari, p. 7, filed 12/8/95.) The claim for sanctions due to petitioners' inclusion of the Pathologist defendants is also relevant for purposes of this petition.

Prior to and during the sanctions hearing petitioner Wilkinson requested that the trial judge recuse himself because of the prejudice he had evinced toward petitioners during the trial and because of the important evidentiary rulings which now related directly to the sanctions. On July 7, 1993, petitioners requested that the trial judge disqualify himself in accordance with a local rule, which required that a private in camera request be made first before a motion is filed in order to provide the

trial judge the opportunity to voluntarily disqualify. The letter states as follows:

> Dear Judge Peterson:
>
> In accordance with Rule 15(a) of the Rules of the District Court, Tulsa County, we hereby submit this "in camera" request for you to disqualify with regard to any further deliberations regarding the law firm of Wilkinson & Monaghan.
>
> There are currently pending claims for fees and costs against the law firm in excess of $650,000.00. It would be in the best interest of everyone concerned for a completely neutral judge who has no background in this litigation to determine these important issues. As you can imagine, the determination of these issues is of vital importance to the law firm and may well mean, "life or death" to the firm. Thus, we want to insure that the adjudication process is completely objective.
>
> Any trial judge is placed in an inherently difficult position when ruling on fees and sanctions of the kind and nature brought against our law firm. This is true because the trial judge has, of course, already entered an Order dismissing certain defendants from the suit. Thus, to be asked subsequently whether such defendants should have properly been named in the first place calls upon the trial judge to use hindsight dating back to the time when the pleadings were filed. This is difficult under the best of circumstances and it is, we believe, impossible under the present situation in this case.
>
> Finally, Judge Peterson, please understand that we mean no disrespect for you personally or officially with regard to this matter. It is

apparent, moreover, that you are not and cannot be neutral with regard to the adjudication of these important issues. For this reason, therefore, we ask you by virtue of this "in camera" communication, to disqualify yourself in this litigation.

Thank you for your consideration in this matter.

Very truly yours,

WILKINSON & MONAGHAN

Bill V. Wilkinson

(T.C. APP. 10,196 at p. 320, Exhibit 7). By letter dated July 14, 1993, the trial court refused to disqualify, citing a failure to comply with Local Rule 15 as the sole reason for his refusal to disqualify.

Prior to the sanctions hearing, petitioners filed a motion asking the trial court to disqualify[2] (T.C. APP. 9686). Five days after the filing of the application and before the defendants responded and without the benefit of a hearing, the trial court denied the application with a

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[2] In their application to disqualify the trial judge, petitioners argued that Judge Peterson and members of his court staff have exhibited actions of bias and prejudice against petitioners (T.C. APP. 9687), that a discovery ruling by the trial judge "evidences prejudice against the [petitioners] and prevents the [petitioners] from receiving fundamental due process" (T.C. APP. 9690), and that the adjudication of the sanctions motion will require a determination of the propriety of the trial court's evidentiary ruling, and that such determination "must be made by an independent and neutral judge in order for the [petitioners] to be fairly judged and for the proceedings to have the appearance of propriety."

minute order (APP. 54a). The sole reason stated by the trial court for denial of the Motion to Disqualify was failure to comply with Local Rule 15(a). In the three-year history of the litigation, no other ruling on any motion or application by any party had ever been made by the trial court in so short a time without a hearing.

When the sanction hearing began, petitioners again raised the issue of disqualification with the trial court. (T.C. APP. 10,196, pp. 92-93). In their Petition in Error filed with the Oklahoma Supreme Court[3], petitioners alleged that the trial court committed error by refusing to recuse as the presiding judge in the sanctions hearing considering the nature and background of the case (Petition in Error filed on May 11, 1994, Exhibit C thereto, ¶ 1). In their Brief in Chief and Reply Brief to the Oklahoma Supreme Court, Petitioners demonstrated that the trial court was not impartial.[4]

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[3] Under Oklahoma law, every appeal filed with the Oklahoma Supreme Court is subject to assignment to the Oklahoma Court of Appeals. Thus, although petitioners filed their Petition in Error with the Oklahoma Supreme Court, the case was assigned to and initially decided at the appellate level by the Oklahoma Court of Appeals.

[4] See Brief in Chief filed on 12/23/94, pp. 24-28. Petitioners argued that the trial court applied the wrong legal standard to the imposition of sanctions because the trial court was not impartial (*Id.* p. 25) and had pre-judged the sanctions issue (*Id.* p. 28). See also petitioners' Reply Brief filed in the Oklahoma Supreme Court on 3/23/95, pp. 37, 39, 40. After demonstrating that the trial court used an improper standard for imposing sanctions, petitioners argued: "The conclusion one must reach is that the Trial Court was influenced by factors which should not have been relevant to the issue of sanctions, including what must be considered his lack of impartiality." *Id.* pp. 39, 40.

At the sanctions hearing, petitioners once again argued that the trial court had improperly excluded the further testimony of Dr. Wright at trial, but in making his findings of fact and conclusions of law the trial court failed even to consider this assertion, APP. 32a-44a, even though sanctions in favor of the dismissed Hillcrest defendants would clearly have been improper had the case against them been submitted to the jury, and petitioners contended throughout that had Dr. Wright's complete testimony been admitted this would have taken place. The trial court awarded each of the Hillcrest defendants and the Pathologist defendants $12,500 of their fees and costs as sanctions against petitioners in the total amount of $100,000.

On appeal to the Court of Appeals, petitioners once again asserted the trial court's error in failing to admit Dr. Wright's full testimony.[5] In its opinion affirming these sanctions, the Court of Appeals acknowledged that petitioners had made this assertion, but refused to review the trial court's evidentiary rulings regarding Dr. Wright's testimony, because "that allegation of trial error has been waived." APP. 15a. The opinion failed to elaborate, and it is clear that at no point did *petitioners* in any way waive that issue. The Court was presumably referring to the fact that petitioners' *clients* in the underlying medical malpractice action had waived the issue, by declining to appeal the demurrers as part of their settlement agreement.

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[5] See Petition in Error filed with the Oklahoma Supreme Court on May 11, 1994, Exhibit C thereto, ¶ 30; Brief in Chief filed on 12/23/94, p. 16; Reply Brief filed on 3/23/95 pp. 13-14.

With the testimony of Dr. Wright excluded, the Court of Appeals noted that "[w]e are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members." APP. 15a. The Court therefore affirmed the award of sanctions. APP. 31a. It was "led to the inescapable conclusions that Wilkinson's and the law firm's allegations against the Hillcrest entities were made without basis in fact, and that Wilkinson's repeated and successful attempts to keep them in the lawsuit after it was apparent that there was no basis in law or fact for their being there was a violation of OKLA. STAT. tit. 12 (1991) §2011." APP. 17a.

In their petition for a writ of certiorari to the Oklahoma Supreme Court, petitioners argued that the Court of Appeals' failure to review the trial court's conclusion concerning the inadmissibility of Dr. Wright's testimony violated their due process rights.[6] However, the Oklahoma Supreme Court denied the writ. APP. 58a.

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[6] Petitioners stated in their Petition for Writ of Certiorari that "[t]he Court of Appeals refused to consider petitioners' argument that the trial court had committed grievous errors in refusing to admit certain testimony that was crucial insofar as the Hillcrest entities and the pathologists were concerned. . . . Depriving petitioners of this issue also violates due process in the sense that the issue was raised at the earliest opportunity." (Petition for Writ of Certiorari filed on 12/8/95, pp. 7-8)

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF SANCTIONS BY A JUDGE WHO HAD CONDUCTED THE TRIAL AND MADE EVIDENTIARY RULINGS RELATING TO THE SANCTIONED CONDUCT VIOLATES THE DUE PROCESS RIGHT TO A NEUTRAL ADJUDICATOR

This case presents a question of enormous theoretical and practical importance that has not yet been directly addressed by this Court: The applicability of a well established line of due process decisions of this Court to the methods used to adjudicate and assess sanctions upon attorneys. Petitioners respectfully submit that this is an issue which this Court should address, in order to remove any question that its cases finding that due process requires a truly neutral adjudicator apply with full force to the attorney sanctions area.

In *In re Murchison*, 349 U.S. 133 (1955), this Court held that the fact that the same judge who had sat as the Michigan "judge-grand jury" before which witnesses had testified also presided at those witnesses' contempt hearing for their conduct during the earlier proceeding violated due process. In so holding, the Court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case. . . .
>
> 349 U.S. at 137.

The Court in *Murchison* relied on its previous holding in *Tumey v. Ohio*, 273 U.S. 510 (1927), that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* at 532, quoted in 349 U.S. at 136. The Court acknowledged that "[s]uch a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " 349 U.S. at 136, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). Applying these due process principles to the case before it, the *Murchison* Court concluded:

> Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of the zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.
>
> 349 U.S. at 137.

"As a practical matter," the Court reasoned, "it is difficult if not impossible for a judge to free himself from the influence of what took place in [the earlier proceeding]. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." Id. at 138. *See also Taylor v. Hayes*, 418 U.S. 488 (1974) (another judge should have been substituted for trial

judge for purpose of finally disposing of contempt charges against counsel); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (same); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (concluding that a contempt determination "should have been made in the first instance by a judge not involved . . . in the petitioner's misconduct.").

This Court's decisions concerning the adjudication of contempt, along with those decisions involving the possibility of a financial interest in the outcome [*see, e.g., Tumey, supra; Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)] and those concerning the requirement of an independent assessment of the need for a search warrant [*see, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971)] ("prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations. . . . "), have established that due process requires a truly neutral adjudicator before an individual may be deprived of life, liberty or property. Such a requirement is dictated both by the utilitarian concern for the need for accurate decisionmaking [*Mathews v. Eldridge*, 425 U.S. 319 (1976)] and the dignitary interest in treating an individual in a fair manner. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (even if a given procedure does not clearly advance the goal of accuracy, it may still be dictated by due process insofar as it "generate[s] the feeling, so important to a popular government, that justice has been done."); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("the requirement of neutrality in adjudicative proceedings safeguards . . . the promotion of participation and dialogue by affected individuals in the

decisionmaking process."). This is because "procedural safeguards are of no real value . . . if the decision maker bases his findings on factors other than his assessment of the evidence before him." Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 476 (1986). Moreover, "the ability to persuade presupposes a persuadable decisionmaker. . . . A system that holds itself out as promoting [the] value [of participation] cannot tolerate the input of a decisionmaker whose presence so dilutes the possibility of meaningful participation." Id. at 488. This Court has therefore recently described the right to a neutral adjudicator as "a mainstay of our system of government." *Gutierrez De Martinez v. Lamagno*, ___ U.S. ___, 115 S. Ct. 2227 (1995).

While to date this Court has not considered the applicability of these forceful precedents to the context of attorney sanction hearings, there exists absolutely no reason, in either logic or practicality, to doubt their relevance. The sanctions against petitioners of course constitute a deprivation of property, thereby triggering the procedural protections of the Due Process Clause. It is well accepted that due process limits the imposition of attorney sanctions.[7] Moreover, the trial judge in this case

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[7] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980); *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 934-936 (2nd Cir. 1992); *Dodd Insurance Services, Inc. v. Royal Insurance Company of America*, 935 F.2d 1152, 1160 (10th Cir. 1991); *Securities Industry Association v. Clarke*, 898 F.2d 318 (2nd Cir. 1990); *In re Perry*, 918 F.2d 931, 935-936 (Fed. Cir. 1990), *cert. denied, Perry v. Amerace Corp.*, 502 U.S. 808, 112 S. Ct. 49, 116 L. Ed. 2d 27, *cert. denied, Pac-Tec, Inc.*

is, for purposes of due process, in much the same position as the judges in *Murchison* and all of the other cases in which a neutral adjudicator was held to be required. On the sanctions motion brought by the Hillcrest defendants, the trial judge had already made up his mind concerning the admissibility of Dr. Wright's testimony when he chose to exclude it during the original medical malpractice suit. By the time of petitioners' sanctions hearing, the trial judge could no longer be properly characterized as a "neutral" adjudicator on that question. He already was, at the very least, predisposed toward the view that the testimony was inadmissible (a fact underscored by his refusal even to respond to petitioners' assertion on that point in his findings of fact and conclusions of law). Thus, at the sanctions hearing, petitioners were forced to make their arguments to one who had already definitely ruled on them in a separate context.[8]

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v. Perry, 502 U.S. 808, 112 S. Ct. 50 (1991); *Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed. Cir. 1989); *Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833, 836 (9th Cir. 1987); *In Re: Yagman*, 796 F.2d 1165, 1180, 1181 (9th Cir. 1986), *amended, rehr'g denied*, 803 F.2d 1085, *mandamus granted, Brown v. Baden*, 815 F.2d 575, *cert. denied, Real v. Yagman*, 484 U.S. 963, 108 S. Ct. 450, 98 L. Ed. 2d 390 (1987).

[8] It is true, of course, that petitioner Wilkinson had the opportunity to argue the claims against both the Hillcrest defendants and the Pathologist defendants during the medical malpractice suit on behalf of the representatives of the Levitt estate. However, this opportunity most certainly fails to satisfy due process requirements. At that time, no sanctions had been sought against petitioners; the arguments were made by petitioners in the context of a medical malpractice litigation *on behalf of their clients*. This opportunity, then, cannot in any way be deemed to satisfy petitioners' *own* due process right to

Similarly, in ruling on the sanctions motion brought by the Pathologist defendants, the trial judge could not be deemed a neutral adjudicator because he had already granted their demurrer at trial.

In asserting that the trial judge in this case failed to constitute the neutral adjudicator required by due process, the petitioners wish to emphasize three further points of great importance. First, petitioners do not contend that the trial judge lacked neutrality because of an abstract philosophical, ideological or legal bias or predisposition. The existence of such biases does not render an adjudicator constitutionally unacceptable, because to so hold would effectively disqualify virtually every judge – with the exception of those who had never given thought to any issue. Meaningful adjudication would thus be rendered all but impossible. In the words of Chief Justice Rehnquist, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972). But such acceptable *abstract* predispositions must be distinguished "from the type of bias that occurs when an individual adjudicates an issue with which she has had prior involvement, either in the position of an advocate *or as a judge in an earlier stage of the case*. The judge then has a strong motivation to hold that her initial decision was the correct one, and to a certain

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defend themselves against sanctions. That right could only be satisfied *at the sanction hearing itself* – by which time the trial judge was no longer a neutral adjudicator.

extent she acts as a judge in her own case." Redish & Marshall, *supra*, 95 Yale L.J. at 502-03 (emphasis added).

This is exactly the situation in the present case, just as it was in the contempt decisions of this Court. At the time of petitioners' sanctions hearing, the trial judge had considerably more invested here than merely some abstract bias or predisposition. He had himself already made important evidentiary rulings and had ruled on the merits in favor of the very parties seeking sanctions. At the sanctions hearing, he was effectively called upon to review the wisdom and correctness of his own prior rulings on the very same issues. He was, then, effectively acting as a judge in his own case.

Secondly, petitioners wish to emphasize that they do not in any way intend to suggest that the trial judge in this case consciously acted out of either a desire to avoid questioning his earlier rulings or any other improper motive. But as this Court's decisions quite clearly establish, no such showing is required in order to disqualify an adjudicator for purposes of due process. To the contrary, this Court emphasized in both *Murchison* and *Tumey* that it was making no finding concerning the motivations of the judges involved in those cases. As this Court stated in *Tumey*: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would *offer a possible temptation to the average man as a judge* . . . denies . . . due process of law." 273 U.S. at 532 (emphasis added).

Finally, petitioners should note that the due process violation was rendered even more egregious as to the sanctions sought by the Hillcrest defendants because of the Court of Appeals' inexcusable refusal even to review the correctness of the trial judge's original refusal to admit Dr. Wright's testimony, an issue that was clearly outcome determinative as to the correctness of the imposition of sanctions against petitioners: The admissibility of Dr. Wright's testimony concerning the corporate connections between the Hillcrest Medical Center, Inc., and the other Hillcrest defendants. Thus, even if meaningful appellate review were found to satisfy the due process requirements of neutral adjudication, the availability of such review on this key issue was lacking in this case.

II.

THE DECISION OF THE COURT OF APPEALS NOT TO REVIEW THE TRIAL COURT'S EVIDENTIARY RULINGS RELATING TO THE SANCTIONS DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND

It is well established that a state court's refusal to adjudicate an issue of federal law will preclude review in this Court if that refusal is based on an independent and adequate state law ground. In the present case, however, the refusal by the Oklahoma Court of Appeals to review the trial court's evidentiary rulings on the ground that "that allegation of trial error has been waived", APP. 15a, does not constitute such an independent and adequate state ground.

Though the Court of Appeals' opinion is unclear as to exactly at what point waiver had been made, the Court could not possibly have been referring to any waiver *on the part of petitioners.* To the contrary, petitioners had raised the trial judge's error in ruling Dr. Wright's full testimony inadmissible at every level of the sanctions process. (T.C. APP. 8225 at 8227; T.C. APP. 10,195 at 358; Petition in Error, Exhibit C thereto, ¶ 18, filed 5/11/94; Brief in Chief, p. 16, filed 12/23/94; Reply Brief, p. 13, filed 3/23/95; Petition for Rehearing, pp. 11-12, filed 10/16/95; Petition for Certiorari, p. 7, filed 12/8/95.) The only waiver to which the opinion could conceivably have been referring, then, is the waiver by the plaintiffs in the underlying medical malpractice action, resulting from their agreement not to appeal. But surely, that waiver cannot prejudice petitioners in their sanctions proceeding. Petitioners by no means share an identity of interests with the plaintiffs in the underlying medical malpractice action. Indeed, by the time they made their decisions not to appeal the trial court's rulings, the medical malpractice plaintiffs had already fired petitioners and replaced them with new counsel. T.C. APP. 8066A. The Court of Appeals, then, was improperly confusing waiver by the medical malpractice plaintiffs in the underlying action with waiver by petitioners in the sanctions proceeding, a confusion lacking any basis in either law or fact.

This Court has uniformly held that a state procedural ground will not serve as an independent and adequate state ground upon which to avoid resolution of a federal issue when that state procedural ground "prevents implementation of the federal right" and the state rule fails to "serve[ ] a legitimate state interest." *Henry v. Mississippi,*

379 U.S. 443, 447 (1965). *See also Douglas v. Alabama*, 380 U.S. 415 (1965). Moreover, use of a state procedural rule to preclude review of a federal claim will fail if it lacks "fair or substantial support." *See, e.g., Rogers v. Alabama*, 192 U.S. 226 (1904). This is true, even if the state court's refusal is the result of irrationality, rather than of the ulterior motive of avoiding resolution of a federal issue. Alfred Hill, *The Inadequate State Ground*, 65 Colum. L.Rev. 943, 959 (1965) ("If the state determination standing in the way of a federal claim is deemed to be arbitrary (i.e., one which is utterly irrational, considering the conceded premises and the presumed honesty of the state judges), that should be reason enough for disallowing it. . . . ").

In the present case, the state court's wholly unfounded finding of waiver cannot be allowed to preclude this Court from assuring that petitioners' constitutional rights are protected.

CONCLUSION

This case presents a situation in which petitioners have been deprived of their property without ever having had the opportunity to challenge the basis for that deprivation before a neutral adjudicator. The fact of this injustice in and of itself warrants this Court's intervention to remedy such an unambiguous violation of constitutional right. Moreover, this case presents this Court with the opportunity to clarify, once and for all, the important intersection between this Court's decisions requiring a neutral adjudicator on the one hand and the adjudicatory

methodology employed in the pervasive system of attorney sanctions throughout the nation, on the other. For these reasons, petitioners respectfully request this Court to grant their writ of certiorari.

Respectfully submitted,

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RELEASED FOR PUBLICATION BY ORDER OF
THE COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION FOUR

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of Norma Levitt, Deceased,	)	
Plaintiffs,	)	No. 83,555
vs.	)	FOR PUBLICATION
HILLCREST MEDICAL CENTER, a corporation, ROBERT MORTON, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation,	)	(Filed Sep. 26, 1995)
Defendants,	)	
and	)	
HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN	)	

WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Appellees,

and

WILKINSON AND MONAGHAN, a Professional Corporation, and BILL V. WILKINSON,

Appellants.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable David L. Peterson, Trial Judge

Medical malpractice action against twenty-one defendants for death of patient after hospital employees administered transfusion with blood warmed in kitchen microwave. Following a defendants' verdict, sixteen defendants sought and received award of sanctions totaling $200,000 for alleged violations of 12 O.S.1991 § 2011. Attorney appeals.

AFFIRMED IN PART AND REVERSED IN PART

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Joseph A. Sharp John H.T. Sheridan Karen M. Grundy Best, Sharp, Holden, Sheridan, Best & Sullivan Tulsa, Oklahoma	For Appellees Gary Breiphol, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Dan Wiesemeyer, M.D., and Duane Brothers, M.D.
Stephen J. Rodolf Karen L. Callahan Barkley, Rodolf & McCarthy Tulsa, Oklahoma	
Tony Jack Lyons Lyons & Lyons Pryor, Oklahoma	For Defendants/Appellees Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc.

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For Appellants Wilkinson & Monaghan, Inc. and Bill V. Wilkinson

OPINION

GOODMAN, P.J.

Appellants Wilkinson & Monaghan, a Professional Corporation (law firm), and Bill V. Wilkinson, an individual, appeal from the trial court's order awarding sanctions to multiple defendants against the law firm and Wilkinson.

I Facts

Wilkinson and his law firm (hereinafter Wilkinson) were retained by the personal representatives of the estate of Norma Levitt to pursue a medical malpractice claim. Norma Levitt died on the operating table at Hillcrest Medical Center in Tulsa, Oklahoma, on November 8, 1989, following successful hip replacement surgery. A nurse anesthetist gave Levitt a unit of Levitt's own blood which had been warmed in a microwave oven located in the employees' lounge.[1] Wilkinson alleged the negligent

[1] Heating blood in this manner destroys the red blood cells, resulting in "gross hemolysis" of the blood, releasing large amounts of potassium. Excessive potassium, when introduced into the body, is often fatal. The practice of warming

introduction of this blood into Levitt's system was a direct cause of her death minutes later. The defendants argued that Levitt died from a blood clot, rather than the hemolyzed blood. Wilkinson's first petition named only Hillcrest Medical Center as defendant. The petition was amended over 15 months later, on November 8, 1991, to include twenty additional individual and corporate defendants.[2]

A jury trial was held, following more than three years of discovery. The trial lasted over three weeks. After seventeen days of trial, the plaintiffs rested. The trial court sustained demurrers by Drs. Jones, Breipohl, Anthony, Spohr, Voss, Wiesemeyer, Puls, Hubner and Brothers. Demurrers on behalf of South Utica Pathology Lab, Jerry L. Puls, M.D., Inc., Hillcrest Health Care Corporation, Hillcrest Real Estate Corporation, Hillcrest Medical Center Foundation, and Hillcrest Service Corporation were also sustained. Demurrers by Hillcrest Medical Center, Drs. Morton and Singletary, Christine Jones, C.R.N.A., and Tulsa Anesthesiology, Inc., were overruled.[3] The case was submitted to the jury against Dr. Morton, Christine Jones, C.R.N.A., Tulsa Anesthesiology, Inc., and Hillcrest Medical Center, Inc., only. A defendants' verdict was returned.

Intravenous (IV) fluids, other than blood, in the microwave was an accepted practice at Hillcrest Medical Center, as reflected in its written procedures.

[2] Dr. Kim Zarintash, M.D., was later dismissed without prejudice.

[3] Dr. Singletary's demurrer was later reconsidered and sustained, leaving only four defendants.

Wilkinson and the law firm filed a motion for new trial. In the meantime, Levitt's estate fired Wilkinson and the law firm, and retained other counsel. The new counsel was able to settle the case against the final four remaining defendants in exchange for foregoing an appeal. None of the issues raised at trial are before us today. The evidentiary and procedural rulings made by the trial judge are not raised on appeal. We will therefore indulge in the presumption that those rulings were correct.

Following the confidential settlement, the non-settling defendants who had earlier been dismissed by the trial court applied for sanctions against Wilkinson and the law firm, alleging violations of 12 O.S.1991 § 2011. Following a two-day hearing, the trial court entered an order on April 11, 1994, which consisted of detailed findings of fact and conclusions of law. The order gave judgment in favor of the sixteen moving defendants in the sum of $12,500 per defendant, for a total judgment against Wilkinson and the law firm of $200,000.

It is from this order Wilkinson and the law firm appeal. Wilkinson's petition in error sets out fifty-three propositions of error. Wilkinson's brief preserves but one: whether or not the sanctions levied were an abuse of the trial court's discretion. Except for those propositions of error set out in the petition in error which are included within the single briefed issue, the balance of the propositions of error are deemed waived. *Hadnot v. Shaw,* 826 P.2d 978 (Okla. 1992); *American First Abstract Co. v. Western Information Systems, Inc.,* 735 P.2d 1187 (Okla. 1987); *State ex rel. Remy v. City of Norman,* 642 P.2d 219 (Okla.

1981). All other allegations of error which occurred during the course of the trial itself are deemed waived, as no appeal from the jury verdict has been perfected.

II Section 2011 Sanctions

The applicable portions of 12 O.S.1991 § 2011,[4] read:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The appellees essentially contend that Wilkinson violated § 2011 either by improperly naming them in the lawsuit without any basis in law or fact or, presuming

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[4] Section 2011 is adopted almost verbatim from Fed. Rules Civil Proc. Rule 11, 28 U.S.C.A.

such a basis in law or fact initially existed, Wilkinson was unable to develop sufficient evidence to maintain a viable cause of action against them, at which time he had the obligation to dismiss them from the lawsuit. Title 12 O.S.1991 § 2011, is adopted from its federal counterpart, Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A. Therefore, we are permitted to review appropriate federal caselaw to aid in our interpretation and application of this rule to the facts in this case. *Unit Petroleum Co. v. Nuex Corp.*, 807 P.2d 251 (Okla. 1991).

III Standard of Review

The standard of review is whether the trial court abused its discretion in imposing sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Broadwater v. Courtney*, 809 P.2d 1310 (Okla. 1991); *Berko v. Willow Creek I Neighborhood Ass'n, Inc.*, 812 P.2d 817 (Okla. Ct. App. 1991). Whether or not the acts of an attorney are done in good faith is no longer the test. " '[T]he new test represents an intentional abandonment of the subjective focus of [§ 2011] in favor of an objective one.' 'Simply put, *subjective good faith no longer provides the safe harbor it once did.*' 'There is no room for a pure heart, empty head defense under [§ 2011].' " *First National Bank and Trust Company of Vinita v. Kissee*, 859 P.2d 502, 512 (Okla. 1993) (emphasis in original) (footnotes omitted). "Rule 11 *requires* lawyers to think first and file later, on pain of personal liability." *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986). There is a duty to dismiss lawsuits when it becomes apparent there is no viable claim against a named defendant. *See Flip Side Productions, Inc. v. Jam Productions Ltd.*, 843 F.2d 1024 (7th

Cir. 1988). The advisory committee notes to Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., lend insight to the application of sanctions.

> The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable. . . . [This duty continues and is] not measured solely as of the time [the allegations] are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. . . . Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention.

The imposition of sanctions, on the other hand, should not be used to punish parties with unpopular claims.

> The standard for bad faith awards is stringent, for "[o]therwise those with colorable, albeit novel, legal claims would be deterred from testing those claims in a federal court." . . .
>
> The defendant seeking fees must not only prevail on the merits, but must also "show plaintiff pursued the litigation in bad faith or brought a frivolous, unreasonable, or groundless action." . . .
>
> Simply because the facts are found against a party "does not by itself prove that threshold of irresponsible conduct for which a penalty

> assessment would be justified." . . . A non-prevailing party should not be penalized for merely prosecuting or defending a lawsuit. (Citations omitted.)

U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1241 (10th Cir. 1988) (citations omitted).

Title 12 O.S.1991 § 2011, encourages colorable, yet novel, claims by prohibiting sanctions for "a good faith argument for the extension, modification, or reversal of existing law."

With these guidelines in mind, we proceed to analyze the facts and law.

IV Allegations of Violations of 12 O.S.1991 § 2011

Wilkinson made allegations against twenty-one defendants, sixteen of whom seek sanctions. These sixteen defendants can be categorized into three different groups, each with a distinct theory of negligence lodged against it. We will examine the allegations made against each group of defendants, determine if Wilkinson violated § 2011 in pursuit of claims against that group, and make a final determination as to whether the trial court's entry of sanctions on behalf of that group was properly supported by the evidence.

A review of the voluminous record reveals certain facts common to all three groups. One and one-half years elapsed between the filing of the plaintiffs' original and amended petitions. Over 30 depositions were conducted, and scores of documents were exchanged during that time. Wilkinson testified at the hearing on sanctions that

he conducted extensive research and engaged in various conversations with other attorneys and medical experts prior to filing suit. At the sanctions hearing, none of the defendants questioned Wilkinson as to what specific inquiries had been made prior to the filing of his amended petition. In fact, many of the defense counsel who testified against Wilkinson merely "assumed" that Wilkinson conducted no prefiling inquiry. None of them claimed to have any personal knowledge of what prefiling research was in fact done. Yet, much of the focus of their quest for sanctions was based on the alleged lack of a prefiling investigation sufficient to justify the filing of a claim against the defendants.

As we interpret § 2011 and the caselaw regarding sanctions, we must make an objective determination as to whether Wilkinson had a reasonable basis to include a particular defendant and then determine whether, if such an initial basis existed, there was sufficient evidence produced during the course of discovery to keep the defendant in the lawsuit. In light of the cases set out above, it is not relevant to our analysis whether Wilkinson successfully proved his allegations at trial, or whether he was even able to introduce evidence at trial in support of such allegations. Our concern is whether the attorney had a reasonable, objectively ascertainable basis to file and maintain the allegations made against the defendants. If at any point in this inquiry we find either that Wilkinson had no reasonable basis in fact or law to initially file the claim, or that after filing the claim he could not produce evidence which would reasonably support the continuation of the claim, we will not hesitate to affirm the trial court's imposition of proper sanctions. However, we will

not uphold sanctions for ineffective or even poor presentation of an otherwise viable claim. Sanctions are not penance for the sins of being on the losing side of a ruling or presenting a novel theory of recovery if it is supported by a good faith argument for the extension, modification or reversal of existing law.

A. Claims against the Hillcrest entities

Wilkinson and the law firm filed a petition against Hillcrest Medical Center (HMC) on July 17, 1990. On November 8, 1991, Wilkinson amended his petition to include Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Inc., Hillcrest Real Estate, Inc., and Hillcrest Service Company. Wilkinson's amended petition alleged that all these corporations "operate a medical facility in Tulsa County known as Hillcrest Medical Center."

According to the affidavit of the President and Chief Executive Officer of both Hillcrest Health Care Corporation and Hillcrest Medical Center, Hillcrest Health Care Corporation is the parent company of all the named Hillcrest defendants, including Hillcrest Medical Center. All of these entities, including Hillcrest Medical Center, are "wholly-owned [sic] subsidiaries of Hillcrest Health Care Corporation, an Oklahoma not-for-profit corporation." It is undisputed that only Hillcrest Medical Center rendered any medical treatment to Levitt. For purposes of this opinion, the parent corporation, Hillcrest Health Care Corporation and all its subsidiaries, except for Hillcrest Medical Center, will be referred to as the Hillcrest Entities.

Wilkinson's theory of recovery against Hillcrest Medical Center (HMC) was based on alleged negligence in the supervision of its employees or those medical service providers who, while technically not employed by HMC, were, nevertheless, under its direction and control. The jury rendered judgment in favor of HMC on this theory. HMC did not request sanctions against Wilkinson. Any issues surrounding the claims against HMC are not before us.

Wilkinson's theory of recovery against the Hillcrest Entities was based on the allegation that the Entities were the alter ego corporations of HMC set up to receive assets diverted to them by HMC. Wilkinson stated his theory of recovery as follows: "We have alleged agency. The truth of the matter is that there is an interwoven, interconnecting relationship between all of the defendants which will render them liable and share ownership of equipment and all kinds of different things. . . . "

This theory was subjected to repeated evidentiary attacks by the Hillcrest Entities, which first filed a Motion to Drop Misjoined Parties on December 5, 1991. In response, Wilkinson successfully defeated this motion by referring to the allegations contained in his amended petition, essentially arguing that each separate, named entity was in fact an agent of the others. Wilkinson seems to argue that each of the Hillcrest Entities was in fact an agent of the other named individual defendant doctors and that each Hillcrest Entity "maintained and exercised the right to control the actions and conduct of all such persons [the allegedly negligent doctors] and they are vicariously liable for their actions under the doctrine of

respondeat superior." At a hearing on this motion, Wilkinson was told by the court that "for an attorney to continue to sign pleadings and sue people that don't need to be sued and shouldn't be sued would be a violation of the rules. So if that develops, I'll expect you to take care of that, or I'll have to. If it doesn't develop, that's fine too."

The Hillcrest Entities later filed a motion for summary judgment on August 31, 1992, again seeking their dismissal. In his response to the motion, Wilkinson presented an affidavit by Dr. Miller-Hardy, Ph.D., which indicated that she would testify concerning the relationship between the Hillcrest Entities and HMC in a manner which would be sufficient to support Wilkinson's allegations of agency. The affidavit of Miller-Hardy merely states: "I believe the other entities had the right to and did exercise control over Hillcrest Medical Center. . . . " There is no further proof of an agency relationship other than this "belief." At the hearing on the motions for summary judgment, the trial court inquired about the depth of Miller-Hardy's knowledge as it pertained to the Hillcrest Entities. Wilkinson assured the court of Miller-Hardy's ability to prove agency between HMC and the Hillcrest Entities. The court said, "My question is: Have you done that in good faith and do you know that she knows?" Wilkinson replied, "Yes sir. Yes to both of those. I have done it in good faith. Yes, sir, I do know that she knows." Wilkinson went on to say "we will show it in the witness stand and to the jury." The court warned Wilkinson that "[Y]ou better be able to do so . . . or I will give you sanctions." Wilkinson assured the court he had sufficient evidence to support his claims. The trial court left

the Hillcrest Entities in the lawsuit based upon Wilkinson's promise to produce evidence.

At trial, however, Wilkinson did not call Miller-Hardy to testify. Instead, Wilkinson presented the trial testimony of Dr. Wright, who testified there was "commonality" of personnel between the board of directors of the various Hillcrest Entities and HMC. The focus of Wright's testimony was on the accreditation process and the adoption of certain standards of care at Hillcrest Medical Center, but had little or nothing to do with the Hillcrest Entities or their relationship to each other. The trial court did not permit Wright to testify further concerning the interrelationship between Hillcrest Medical Center and the Hillcrest Entities, as it was clear the witness' familiarity with those entities was limited, and thus lacked sufficient foundation to be used as a basis of expert opinion. While Wilkinson's brief on appeal claims this evidence was improperly excluded, that allegation of trial error has been waived. We are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members. We have reviewed the deposition transcript of Dr. Wright taken June 27, 1992, which was opened and reviewed by the trial court. The pre-trial testimony of Dr. Wright is critical of some of the Anesthesiologists, but contains no opinions on the relationship between Hillcrest Medical Center and the Hillcrest Entities. Indeed, Wilkinson has not pointed out any such references to this court in any of his briefs.

As we understand Wilkinson's theory of liability, based on the evidence in the record and Wilkinson's

testimony at the sanctions hearing, the focus of this theory was two-fold: that the Hillcrest Entities were to be held liable for the negligent acts of HMC, a sibling subsidiary corporation; and that Hillcrest Health Care Corporation was responsible as a parent corporation for the negligent acts of its subsidiary, HMC, by virtue of respondeat superior or an agency relationship. We find no basis in law for such allegations. It is clear that had one of the subsidiaries committed a tort, the parent company, presuming proof the subsidiary was in fact an alter ego of the parent, could also be held accountable.[5] The liability would not flow, however, to other sibling subsidiary corporations. The doctrine of respondeat superior has its roots in master-servant/employer-employee cases, not corporate responsibility. Agency is likewise an employer/employee doctrine, but it requires proof of both an agent and a principal and an express or implied agreement for

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[5] The general rule is that a corporation is a distinct legal entity separate and apart from other legal entities or stockholders. *Gulf Oil Corp. v. State*, 360 P.2d 933 (Okla. 1961). However, this legal fiction may be avoided if it is established that the separate corporate existence is a design or scheme to perpetuate a fraud or where a corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another. *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936); *Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corp.*, 877 P.2d 605 (Okla. Ct. App. 1994). "Oklahoma permits the court to disregard the corporate entity if used, (1) to defeat public convenience, (2) justify wrong, (3) to perpetrate fraud whether actual or implied, or (4) to defend crime." *Robertson v. Roy L. Morgan Production Co.*, 411 F.2d 1041, 1043 (10th Cir. 1969) (citations omitted). *See also Matter of Estate of Rahill*, 827 P.2d 896 (Okla. Ct. App. 1991).

the former to act on behalf of the latter. Wilkinson has failed to produce any evidence to prove who was the principal and who was the agent or the existence of such a relationship. There is no evidence which would establish that the parent/subsidiary corporations were so closely linked and so inextricably intertwined as to be effectively one entity. The showing of a common board of directors and a unity of corporate purpose is insufficient to pierce the corporate veil. *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15; 61 P.2d 645 (1936). We have meticulously reviewed the record to find evidence introduced by Wilkinson to prove his allegations of inter-corporate agency and an agency relationship between HMC, the Hillcrest Entities, and the individual defendant physicians as alleged by Wilkinson. We find no objective convincing evidence of such.

Having reviewed the voluminous trial court record, the briefs of the parties, the affidavits and evidence, and applying the law set out above, we are led to the inescapable conclusions that Wilkinson's and the law firm's allegations against the Hillcrest Entities were made without basis in fact, and that Wilkinson's repeated and successful attempts to keep them in the lawsuit after it was apparent that there was no basis in law or fact for their being there was a violation of 12 O.S.1991 § 2011. While we find no proof by the Hillcrest Entities that Wilkinson failed to conduct a pre-filing investigation, we do find there is no objective, reasonable basis to conclude that Wilkinson had a colorable claim against these corporate entities. Assuming arguendo there initially existed such a basis, it is clear that Wilkinson produced no evidence to

support the continuation of the lawsuit against the Hillcrest Entities.

We have examined the evidence presented by the Hillcrest Entities in support of their quest for sanctions, and find the evidence supports the trial court's findings of fact and conclusions of law, and the trial court properly awarded sanctions against Wilkinson and his interest in the law firm in favor of the Hillcrest Entities.[6] Wilkinson does not preserve as an issue the amount of sanctions; merely the imposition of them. We therefore affirm the award of sanctions in the amount of $12,500 each to Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company and Hillcrest Real Estate, Inc.

B. Claims against Anesthesiologists

Wilkinson's amended petition added as defendants the following anesthesiologists: Drs. Morton, Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers (Anesthesiologists), and Tulsa Anesthesiologists, Inc. The Anesthesiologists were the individual shareholders of Tulsa Anesthesiologists, Inc. Of these individuals, only two had any significant connection with

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[6] The trial court awarded sanctions "against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan." The trial court correctly noted that sanctions levied against the law firm itself are prohibited in Oklahoma. *Unit Petroleum Co. v. Nuex Corp.*, 807 P.2d 251 (Okla. 1991).

the Levitt operation: Dr. Morton, who actually administered or supervised the giving of anesthesia to Mrs. Levitt, and Dr. Jones, who attempted resuscitation of Mrs. Levitt following the blood transfusion.[7] Of the remaining individual doctors, none ever had any direct connection with Levitt's medical care.[8] Wilkinson alleged that because of substandard training by the individual anesthesiologists, it was common for the nurses and staff to warm IV solutions in a microwave oven, rather than use the slower, but safer, blood warmers that were available. It was only a matter of time, Wilkinson alleged, that these same people would warm blood in a microwave, as well as IV solutions. Wilkinson presented evidence that the practice of microwaving IV solutions was the topic of a study at Hillcrest. In fact, Abbot Laboratories, the manufacturer of the IV solutions, mailed Hillcrest a letter containing a statement that microwaving the solutions was not recommended. Wilkinson's evidence showed that any

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[7] Additionally, Dr. Singletary assisted Dr. Jones during the resuscitation attempt, and Dr. Voss performed the pre-operative evaluation of Norma Levitt.

[8] In fact, Dr. Spohr was on vacation the date of the surgery, and Dr. Brothers had retired from the Corporation forty-five days preceding the operation. At first glance, it may appear Dr. Brothers was never a proper party to the suit. Because, however, we understand Wilkinson's theory of liability to be critical not only of the IV warming procedures themselves, but also of the role the professional corporation of anesthesiologists played in the development of standards resulting in those procedures, and because Dr. Brothers was a shareholder and participant in the Corporation at the time those IV warming protocols were adopted, Dr. Brothers is arguably causally connected to Levitt's death under the dangerous condition theory urged by Wilkinson.

of the Anesthesiologists had the authority to question and stop the practice of microwaving IV solutions at Hillcrest. Wilkinson contends they had an affirmative duty to do so. The fact none of the Anesthesiologists questioned or stopped this practice from occurring, despite their superior knowledge that the practice was questionable, became the basis for Wilkinson's allegations against all the Anesthesiologists, despite their lack of a direct doctor/patient relationship to Mrs. Levitt. Wilkinson alleged that the Anesthesiologists violated a duty to Mrs. Levitt by allowing a dangerous condition to exist which they were in a position to correct but failed to do so.

The plaintiffs' expert witness, Dr. Larson, an anesthesiologist and professor of anesthesia and neurosurgery from Stanford University, testified in his deposition on August 14, 1992, that all the Anesthesiologists in general, and Dr. Morton in particular, had deviated below a national standard of care by not prohibiting the warming of blood in a microwave oven. At trial, this witness was again asked whether all the Anesthesiologists were negligent for their failure to intervene. The Anesthesiologist defendants objected, claiming such criticisms were a surprise as those criticisms had not been raised in the "discovery" deposition. Wilkinson responded by claiming the witness was in fact critical of all the individual physicians in his deposition. Indeed, the trial court recognized that "this witness gave some broad things in his deposition that could have been delved into by defense counsel if they individually had any responsibility or did anything wrong in the cause – in causing the death of Norma Levitt." After repeated objections were made by defense

counsel that they were surprised by Dr. Larson's specific criticisms of each Anesthesiologist, the trial court again noted that "[H]is opinions were to all anesthesiologists. If you want to know who 'all' was, you could have asked in the deposition, but I want it related to this case, not just some broad thing out there." Larson went on to criticize the inadequate training of the nurse anesthetist and the circulating nurse. Dr. Larson was asked the following question:

> Q. (by Mr. Wilkinson) What do you believe that Dr. Fred Jones should have done that he did not do with regard to Norma Levitt, please?
>
> [objections by Dr. Jones' counsel overruled]
>
> A. Dr. Jones failed to recognize the potential risks of warming IV solutions in the standard microwave in the coffee room in the lounge.
>
> He failed to recognize the flaws in the study that was done of IV solutions and the temperatures after microwaving. And I have a series of flaws in that study that Dr. Jones should have known would invalidate the study and make it meaningless with respect to the microwaving of IV solutions.

Although not as specific, this answer reflects the criticisms Larson had against each of the individual Anesthesiologists.

Following the plaintiffs, case in chief, the demurrers of all the Anesthesiologists, except Dr. Morton and Tulsa Anesthesiologists, Inc., were sustained. The jury returned a verdict in favor of Dr. Morton and Tulsa Anesthesiologists, Inc.

Because Dr. Morton and Tulsa Anesthesiologists, Inc.,[9] did not seek sanctions, we do not address the evidence relating to their actions. We are primarily concerned with whether or not Wilkinson had any objective basis to maintain an action against the other Anesthesiologists.

At the sanctions hearing, the Anesthesiologists argued that because there was no doctor-patient relationship between them and Mrs. Levitt they were improperly brought into the suit. They contend "it is painfully obvious that Wilkinson had no viable theory upon which to sue these individual anesthesiologists, nor did he ever have the evidence necessary to maintain a claim against [them]." We disagree.

Section 2011 specifically contemplates actions that are "well grounded in fact and [are] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [are] not interposed for any improper purpose . . . . " Wilkinson sought to hold the non-treating Anesthesiologists liable in tort to Levitt on the theory they allowed an unreasonably dangerous condition to exist by not prohibiting the warming of any IV solutions and, by extension, blood, in a kitchen microwave. The Anesthesiologists' brief continually points out that Wilkinson's theory of liability is not warranted by existing law. Assuming arguendo this is true, it still does not account for that portion of the rule which allows a claimant to expand the

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[9] Christine Jones, CRNA, likewise did not seek sanctions.

boundaries of case law by advocating a good-faith argument for the extension, modification, or reversal of existing law. Sanctions should not be used to chill new theories of recovery that are now novel, but may one day become recognized. We note that the theory of allowing the existence of an unreasonably dangerous condition is a common theory in premises liability cases and in general tort cases.[10] While we have not found it to be a theory used often in the reported medical negligence cases, that is not to say advancement of this theory is totally without merit in such a novel context. While we do not offer an opinion on the viability of such a theory, we have found sufficient objective evidence in the record to support the advocation of such a theory. We agree that, for whatever reason, that theory was insufficiently supported by admissible evidence at trial and was thus unable to withstand a demurrer. The fact the theory against these particular defendants ultimately fell short, due to evidentiary and procedural infirmities, of the necessary prima facie proof to require submission of that theory to the jury does not retroactively make the entire theory frivolous or without a reasonable basis in law.

Thus we hold that the trial court abused its discretion in granting sanctions against Wilkinson as to these defendants. We wish to point out that while this court does not

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[10] *See Grover v. Superior Welding, Inc.*, 893 P.2d 500 (Okla. 1995); *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994); *McKinney v. Harrington*, 855 P.2d 602 (Okla. 1993); *Chase v. Parry*, 326 P.2d 809 (Okla. 1958); *Robison v. Stokes*, 882 P.2d 1105 (Okla. Ct. App. 1994).

condone the naming of unnecessary defendants, and condemns the "shotgun" approach to naming defendants, we have scrutinized this voluminous record with the knowledge that novel theories of law are often pled inefficiently at first. We recognize the law to be a dynamic evolving body which must make room for theories that are often at first unpopular or misunderstood. A review of manufacturers product liability law before *Kirkland v. General Motors Corp.*, 521 P.2d. 1353 (Okla. 1974), would have led to a conclusion that it would have been sanctionable to bring in multiple manufacturing defendants involved in introducing a product into the stream of commerce. The evolution of this body of law would have proved such an initial conclusion erroneous.

We therefore vacate the portion of the order awarding sanctions to defendant Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers (Anesthesiologists).

C. Claims against Pathologists

Wilkinson named Dr. Puls, Dr. Hubner, Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc. (Pathologists) as defendants. He alleged these defendants were in charge of establishing and overseeing the procedures used in the blood bank at Hillcrest.

Wilkinson's cause of action against the Pathologists is similar to that lodged against the Anesthesiologists: allowing a dangerous condition to exist by virtue of improper training and failing to establish proper rules and procedures regarding the warming of IV solutions

and blood. As a result, based upon their superior knowledge as to the dangers to patients in general, they violated a duty to Levitt, which caused her death. Wilkinson consulted Dr. Larson, an anesthesiologist, before the amended petition was filed. There is no evidence that Wilkinson ever consulted a pathologist prior to filing his amended petition.

The Pathologists argued at the sanctions hearing and in their appellate brief that Wilkinson had no basis in fact or law for filing the initial claim against the Pathologists or that, assuming he did have such a basis in law or fact, he did not produce sufficient evidence to maintain the claims against them. The analysis of the arguments presented by the Pathologists differs from that of the Anesthesiologists in that the expert relied upon by Wilkinson was not himself a specialist in pathology, but anesthesiology. Further, the criticisms of the defendant Pathologists are not based upon actions done in the course of their specialty as pathologists, but as operators of the hospital's blood bank.

The trial court's findings of fact and conclusions of law contain the following statement related to the Pathologist defendants:

> [T]he evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt.

This finding was erroneous. Wilkinson's expert witness, Dr. Larson, was deposed on August 14, 1992, at which time he set out his criticism of Drs. Puls and

Hubner, as individuals. We must assume that Dr. Larson's opinions, set out in part below, are the same opinions conveyed to Wilkinson in his pre-filing investigation, and are the opinions that Wilkinson in turn relied upon as the basis for filing his amended petition. In response to questioning, Larson stated:

> Q. Sir, do you have any reason to believe that the death of Norma Levitt was somehow related to a failure on the part of Dr. Puls or Dr. Hubner to maintain properly functioning, reliable blood warmers in the hospital?
>
> A. Yes.
>
> . . . .
>
> Q. The next criticism listed there is a "failure to stop the use of microwave ovens for warming I.V. solutions." Do you have any information that Dr. Hubner and Dr. Puls were in any way aware of this practice?
>
> A. No. They should have been aware of it if it was a hospital policy and it was in the nursing guidelines that this was acceptable practice, and they were responsible for the warming equipment for solutions. They should have been aware that there was another means being used in the hospital besides their equipment for warming any kind of intravenous solution.
>
> Q. Are you under the impression that there was something in the nursing guidelines that would have gone under the nose of Dr. Hubner and Dr. Puls permitting the use of microwave ovens to warm I.V. solutions?

> A. Well, I presume he would see the policies and procedures relating to the warming of solutions since he was responsible for that activity in that hospital. He should have known about it. They should have brought it to his attention.

The defendant Pathologists contend that because Dr. Larson was an anesthesiologist, and not a pathologist, Wilkinson had no reasonable basis to rely on Larson's testimony in support of a claim against the defendant Pathologists. In other words, the Pathologists claim that only a fellow pathologist was qualified to render an opinion against them. Wilkinson's pathology expert, Dr. Zuck, had no criticism of the defendant Pathologists. Therefore, conclude the Pathologists, Larson's testimony was insufficient to form a basis to file or maintain an action against them.

We disagree. Title 12 O.S.1991 § 2702 reads:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

While we are familiar with the practice of expert witnesses testifying only against those in a similar specialty, we find there is sufficient basis in the law to hold that such a practice, though common, is not absolutely essential to maintain the viability of a lawsuit. *See Quinton v. Farmland Industries, Inc.*, 928 F.2d 335 (10th Cir. 1991). "The fact that the physician is not a specialist in the

field in which he is giving his opinion affects not the admissibility of his opinion but the weight the jury may place on it." *Payton v. Abbott Labs*, 780 F.2d 147, 155, 156 (1st Cir. 1985); *Sprague v. Bowen*, 812 F.2d 1226 (9th Cir. 1987); *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949 (10th Cir. 1987); *Heinze v. Heckler*, 581 F.Supp. 13 (E.D.Pa. 1983). We therefore conclude that Wilkinson had a sufficient objective basis in law to rely upon the qualifications of Dr. Larson, anesthesiologist, to render an expert opinion regarding the blood bank at Hillcrest run by the defendant Pathologists. That reliance, though arguably tenuous, was sufficient to support the initial filing of the amended petition.

We therefore hold that the finding set out above in the trial court's order was erroneous. If the award of sanctions against Wilkinson in favor of the Pathologists was grounded solely on a lack of basis to file the claim, we would vacate completely that portion of the order awarding sanctions on that basis. However, there remains the issue of whether Wilkinson had a sufficient basis to continue to hold the defendant Pathologists in the lawsuit.

Well before trial it became objectively apparent that Wilkinson's case against the defendant Pathologists had evaporated. During the deposition of Dr. Larson taken August 14, 1992, Dr. Larson was asked the following question:

> Q. Are you qualified or are you an expert witness in the area of blood banking?
>
> A. No.

Larson went on in his deposition and expressed criticism of Drs. Puls and Hubner for not prohibiting the use of microwave ovens in the warming of IV solutions in their capacity as directors of the Hillcrest blood bank.

Larson admitted again at trial that he did not consider himself an expert witness in the area of blood bank procedures. Dr. Larson admitted that though he knew "a substantial amount about blood banking," he stated "I'm not an expert witness in blood banking."

Moreover, we have reviewed the testimony of Wilkinson's remaining experts and found them to contain no criticism of the defendant Pathologists. Indeed, Dr. Zuck, the plaintiffs' expert on blood banks and blood transfusions, had no criticism of either Drs. Puls or Hubner. Zuck's deposition was taken June 10, 1992, a month before Larson's deposition.

Our analysis of this issue leads to the conclusion that at the sanctions hearing Wilkinson presented sufficient evidence that he conducted an adequate pre-filing investigation. His filing of a claim against the Pathologists was therefore based on an objective, reasonable belief that such a claim was well-grounded in law. There subsequently came a time, however, when Wilkinson should have known that his claim against the Pathologists was destined to fail. We find that time came on August 14, 1992, during the deposition of Dr. Larson. Although he was willing to express criticisms against the Pathologists, it was clear that because of his own admission that he was not an expert in blood bank procedures, Larson would be unqualified to render an expert opinion as to blood bank procedures. With his designated pathology

expert earlier unable to fault the Pathologists, it was clear that Wilkinson would not be able to present sufficient evidence to maintain a viable cause of action against the Pathologists. Yet, Wilkinson went on for months before the defendant Pathologists were finally dismissed from the case at the close of the plaintiffs' case in chief on May 13, 1993. Wilkinson's failure to dismiss the Pathologists when it became clear he had no evidence against them was properly subject to sanctions.

Proceedings to impose sanctions are of equitable cognizance and, while an appellate court will examine and weigh the proof in the record, we will abide by the law's presumption that the decision is legally correct and cannot be disturbed *unless* found to be clearly contrary to the weight of the evidence or to some governing principle of law. If legally correct, the ruling may not be reversed because of the lower court's faulty reasoning, erroneous finding of fact, or its consideration of an immaterial issue. *Matter of Estate of Pope*, 808 P.2d 640, 646 (Okla. 1990).

We have reviewed the findings of fact and conclusions of law which set out the basis of the trial court's award of sanctions in favor of the Pathologists. Except for the one finding discussed above, we find that sufficient evidence supports the remainder of the order and that the decision is legally correct. Wilkinson does not preserve the issue as to the amount of sanctions, or the methodology used by the court in arriving at the figure. Accordingly, we vacate that portion of the order awarding

sanctions to the Anesthesiologists against Bill V. Wilkinson, individually.[11]

V

Conclusion

We affirm the award of sanctions in the amount of $12,500 each to defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry L. Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc. We vacate the award of sanctions to the defendant Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers.

AFFIRMED IN PART AND REVERSED IN PART.

RAPP, V.C.J., and STUBBLEFIELD, J., concur.

September 26, 1995

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[11] *See* n.6.

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER**, a corporation, et al., Defendants. and **MERLE LEVITT**, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER**, a corporation, et al., Defendants.	No. CJ-90-3403 (Consolidated with CJ-91-2677) (Filed Apr. 11, 1994)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the order of the Court entered on January 18, 1994, this matter came on for hearing at 9:30 a.m. on the 29th day of March, 1994 and continued through March 30, 1994 on the motions of the Defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc. (hereinafter referred to as Hillcrest Entities), Dr. Gary Breipohl, M.D., Dr. Jonathan Anthony, M.D., Dr. Robert Spohr, M.D., Dr. Thomas Singletary, M.D., Dr. Harold Voss, M.D., Dr. Dan Wiesemeyer, M.D., Dr. Duane

Brothers, M.D., (hereinafter referred to as Anesthesiologists), and Dr. Frederick Jones, M.D., (hereinafter referred to as Jones) and Dr. Douglas Hubner, M.D., Dr. Jerry Puls, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology (hereinafter referred to as Pathologists), for sanctions against Bill V. Wilkinson, personally and the law firm of Wilkinson & Monaghan.

The Court, having reviewed the pleadings and briefs filed in said cause, heard the sworn testimony of witness and the arguments of counsel, being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The above named Defendants were joined as party defendants on or about November 8, 1991, by the filing of an Amended Complaint signed by Mr. Bill V. Wilkinson, individually and on behalf of the law firm of Wilkinson & Monaghan.

II.

During the pretrial proceedings the Hillcrest Entities filed a Motion for Summary Judgment based on the fact they did not control the methods for providing medical services for patients of Hillcrest medical Center, and were not otherwise liable. Mr. Bill V. Wilkinson continually assured the Court there would be evidence of legally responsible control. During pretrial proceedings the Pathologists, Fred Jones and the Anesthesiologists made

numerous oral motions for summary judgment and requests for dismissal on the grounds that there had been no evidence adduced during discovery which would justify the Court submitting these Defendants to the jury.

III.

During the pretrial procedures the Court advised Mr. Bill V. Wilkinson on several occasions, including the pretrial conference, that he should evaluate and reexamine his allegation against the above-named Defendants, that lawsuits are a traumatic experience to all parties and their families, and he should dismiss those against whom he had no viable case to submit to the jury. The Court further advised Mr. Bill V. Wilkinson that his failure to so do might result in sanctions. The Court denied summary judgment to the Hillcrest Entities on the basis of an affidavit from Dianne Miller Hardy whose testimony Mr. Wilkinson assured the Court would make the requisite link between the Hillcrest Entities and the allegations in his Amended Complaint. Mr. Wilkinson never called Dianne Miller Hardy to testify.

IV.

The trial of this case ran from April 20, 1993 until May 18, 1993, a period of twenty-one days, despite assurances it would be two weeks or less.

V.

At the conclusion of the evidence on behalf of the Plaintiff in said cause, the Court sustained demurrers and

dismissed the Hillcrest Entities, the Pathologists, Dr. Fred Jones, and all of the moving Anesthesiologists, with the exception of Dr. Thomas Singletary, M.D. At the conclusion of all the evidence, the Court sustained a Motion for Directed Verdict on behalf of Dr. Thomas Singletary, M.D. and dismissed him from the lawsuit.

VI.

The jury returned a verdict for the four remaining Defendants, Hillcrest Medical Center, Chris Jones, C.R.N.A., Dr. Robert Morton, M.D. and Tulsa Anesthesiologists, Inc. At that time the Court dismissed the companion case (CJ-91-2677) because no viable claims remained.

VII.

Subsequent to the trial of said cause, the Hillcrest Entities, Anesthesiologists, Jones and Pathologists each filed motions for sanctions and costs predicated upon the violation of 12 O.S. 1991 §2011 by Mr. Bill V. Wilkinson and the law firm. Said motions were set for hearing and heard by the Court on March 29 and March 30, 1994.

VIII.

The Hillcrest Entities presented expert testimony that their joinder as party defendants was in violation of 12 O.S. 1991 §2011, as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the

law firm failed to produce any evidence that the Hillcrest Entities were involved in providing medical care and treatment to Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the action pursuant to the admonitions and pleading of the trial court amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless and tremendous increase in the cost and time of litigation. The Hillcrest Entities presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

IX.

The Pathologists presented evidence that Mr. Bill V. Wilkinson and the law firm were guilty of violation of 12 O.S. 1991 §2011 as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson testified under oath in response to Pathologists' attorneys that prior to joining them as party defendants he did not contact or consult with any pathologist to ascertain whether the alleged conduct of Pathologists was below the standard of care. Furthermore, the evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law

firm to dismiss the Pathologists from the action, pursuant to the admonition and pleading of the trial judge, amounted to harassment of these doctors, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation. The Pathologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, and said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

X.

The Anesthesiologists presented expert testimony that they had no involvement in the care and treatment of Norma Levitt, and their joinder as party defendants was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence that the moving Anesthesiologists were involved in the care and treatment of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the present action, pursuant to admonition and pleading of the trial court, amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and resulted in a needless increase in the cost and time of litigation. The Anesthesiologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other related costs, said testimony further established that the

attorney fees charged were in conformity with the usual charges in the Tulsa area.

XI.

Dr. Frederick Jones presented expert testimony that his joinder as a party defendant was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against him were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence at the trial that Dr. Frederick Jones violated the standard of care in the treatment which he rendered to Norma Levitt. The failure of Mr. Bill V. Wilkinson and the law firm to dismiss Dr. Frederick Jones from the action pursuant to the admonition and pleading of the trial court, amounted to harassment of Dr. Frederick Jones, caused unnecessary delays in discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation, particularly as to Dr. Frederick Jones. Dr. Frederick Jones further presented expert testimony as to the reasonable necessity of costs incurred by way of attorney fees and other costs. Said testimony further established that the attorney fees charged were in conformity with the usual charges in Tulsa County.

XII.

Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendants' motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the

Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation," and that but for those rulings, the "evidence" would have come in. The Court is still left to speculate whether the required "evidence" ever existed and the exact nature of the "evidence". The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the rules of evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. §2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them.

XIII.

The Court finds that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994 in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones or on behalf of his cross-claim for sanctions.

CONCLUSIONS OF LAW

Any finding of fact which should be designated as a conclusion of law is hereby denominated as a conclusion of law.

I.

The Court finds that the Hillcrest Entities, Pathologists and Anesthesiologists are the proper parties to seek sanctions. *Sassower v. Field,* 138 F.R.D. 369 (S.D. New York 1991), 12 O.S. 1991 §2017 mirrors Federal Rule 17(a); therefore federal decisions interpreting Rule 17 and the law applicable thereto are persuasive authority under Oklahoma law. *First Life Assurance Company v. Mountain,* 848 P.2d 117 (Okl. App. 1993).

II.

The signature of an attorney of party constitutes a certificate by him that he has read the pleading, motion, or other paper, and that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well-grounded in fact and warranted by existing law. The signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order by Mr. Wilkinson in this case constitutes such a certificate.

III.

12 O.S. Section 2011 imposes an affirmative obligation upon litigants to stop and think before initially making legal or factual contentions; Section 2011 also imposes a duty to refrain from continuing to advocate a position

or prosecute a claim which has ceased to have any merit or after it becomes clear the claim has no merit; Section 2011 also mandatorily requires the Court to apply sanctions when warranted.

IV.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the Court must, to the extent possible, limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the Court, and then only in extraordinary circumstances. Rule 11, *Advisory Committee Notes,* 1983 Amendment. As a matter of law, the discovery conducted by Mr. Wilkinson was appropriate under the circumstances, but the additional discovery requests and pending Motions to Compel and Motion to Inspect would not be in compliance with the Rule, and are overruled.

V.

The failure of Mr. Bill V. Wilkinson and the law firm to conduct a reasonable investigation or to produce any competent evidence which was well grounded in fact or warranted by existing law establishing the liability of the moving Defendants in this case, despite his continually disputed assurance that he would do so, constituted bad faith and oppressive behavior and is sanctionable under 12 O.S. 1991 §2011. *Winters v. City of Oklahoma City,* 740 P.2d 724, 728 n. 22 (Okl. 1987).

VI.

The Court is not at liberty to disregard undisputed evidence and must accept the same as true. The undisputed evidence offered on behalf of the Hillcrest Entities, Jones, Pathologists and Anesthesiologists regarding the violation of 12 O.S. 1991 §2011 and the testimonial evidence regarding the reasonableness of the attorney fees must be accepted as true. *Thomas v. Thomas*, 565 P.2d 722 (Okl. App. 1976).

VII.

The Hillcrest Entities, Jones, Pathologists and Anesthesiologists have met their burden of proof in support of their Motion for Sanctions, and the Court concludes that sanctions in the form of attorney fees and costs should be imposed against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan. *Unit Petroleum Company v. Nuex Corporation*, 807 P.2d 251 (Ok. 1991), and that his counter-claim should be denied.

The combined amount of the sanctions of over $710,000 that was requested is easily justifiable under the extreme and frivolous and malicious circumstances in this case and was reasonably and fairly calculated by all of the defendants. However, the Court must also consider other factors which include deterrence, ability to pay, *history*, bad faith, malice, severity, et cetera, and sanctions should not be used to drive an attorney out of practice or take the place of bar discipline. *White v. General Motors Corporation, Inc.*, 908 F.2d 675 (10th Cir. 1990). Therefore, considering all of the above criteria, the Court finds that

Defendants Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc., Dr. Gary Breipohl, Dr. Jonathan Anthony, Dr. Robert Spohr, Dr. Thomas Singletary, Dr. Harold Voss, Dr. Dan Wiesemeyer, Dr. Duane Brothers, Dr. Frederick Jones, Dr. Douglas Hubner, Dr. Jerry Puls individually, Jerry L. Puls, M.D. Inc., and South Utica Pathology should each be awarded $12,500 of their respective fees and costs as sanctions against Mr. Bill V. Wilkinson and his interest only in the law firm.

Since this Court is not aware of Mr. Wilkinson's net worth and does not desire to cause undue harm to his family or his practice, the Court would consider reducing these amounts if furnished a complete CPA certified accounting of his assets, liabilities, and net worth, if this accounting is furnished within 15 days. If the accounting is not furnished, then execution may issue on the above amounts after 15 days has expired.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of April , 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

JOSEPH M. BEST
100 West 5th St., Suite 808
Tulsa, OK 74103

STEPHEN J. RODOLF
2700 Mid-Continent Tower
Tulsa, OK 74103

BILL V. WILKINSON
7625 East 51st, Suite 400
Tulsa, OK 74145

MICHAEL P. ATKINSON
525 S. Main, Suite 1500
Tulsa, OK 74103

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7134 South Yale, Suite 900
Tulsa, OK 74136

BILL SELLERS
600 S. Main
Sapulpa, OK 74067

JOHN R. PAUL
9 East 4th Street, Suite 400
Tulsa, OK 74103

TONY JACK LYONS
P.O. Box 1046
Pryor, OK 74362

GARY W. DAVIS
20 N. Broadway, Suite 1800
Oklahoma City, OK 73102

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett,
Deputy Court Clerk

Judge Peterson

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

MERLE LEVITT, WILLA WARNER and LINDA JONES Plaintiffs, vs. HILLCREST MEDICAL CENTER, et al, Defendants.	)	Case No. CJ-91-2677 (Filed Nov. 5, 1993)

ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bill Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D., and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to commencement of oral arguments, the parties announced they had reached an agreement regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case is in the best interest of the Plaintiffs, is fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The Orders of this Court dismissing the Defendants with prejudice shall remain intact, all as appears of record.

3. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including former attorneys, Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are hereby satisfied and discharged.

4. The settlement proceeds for all cases are to be paid to the Court Clerk of Tulsa County, who is to place the settlement proceeds on deposit with the county Treasurer in an interest bearing account, under seal, to be distributed upon further Order of this Court.

5. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

6. This action is therefore dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs

and Sanctions against Bill V. Wilkinson and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings should be and are hereby made the Order and Judgment of this Court.

Dated this 5th day of November, 1993.

/s/ David L. Peterson
DISTRICT JUDGE

Judge Peterson

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of NORMA LEVITT, Deceased,	)	Case No. CJ-90-3403
Plaintiffs,	)	(Filed Nov. 5, 1993)
vs.	)	
HILLCREST MEDICAL CENTER, et al,	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bill Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D., and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to commencement of oral arguments, the parties announced they had reached an agreement regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case is in the best interest of the Plaintiffs and the Estate of Norma Levitt, is fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The Orders of this Court dismissing certain Defendants at the close of the Plaintiffs' evidence, and the verdict of the jury in favor of the remaining Defendants, Hillcrest Medical Center, Tulsa Anesthesiologists, Inc., Robert Morton, M.D., and Christine Jones, CRNA, shall remain intact, all as appears of record.

3. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including former attorneys, Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are hereby satisfied and discharged.

4. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

5. This action is therefore dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs and Sanctions against Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings should be and are hereby made the Order and Judgment of this Court.

Dated this 5th day of November, 1993.

/s/ David L. Peterson
DISTRICT JUDGE

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

MERLE LEVITT, WILLA WARNER and LINDA JONES Plaintiffs, v. HILLCREST MEDICAL CENTER, et al, Defendants.	)	No. CJ-91-2677 (Filed Jan. 14, 1994)

AMENDED ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bills [sic] Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D. and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to the commencement of oral arguments, the parties announced they had reached an agreement

regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case are in the best interest of the Plaintiffs, are fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The orders of this Court dismissing the Defendants with prejudice shall remain intact, all as appears of record.

3. The settlement proceeds for all cases are to be paid to the court clerk of Tulsa County, who is to place the settlement proceeds on deposit with the county treasurer in an interest bearing account, under seal, to be distributed upon further order of this Court, after a determination is made as to viability and/or amount of the attorney liens of Bill V. Wilkinson and Wilkinson & Monaghan, Inc.

4. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including Bill V. Wilkinson, and Wilkinson & Monaghan, Inc. are hereby satisfied and discharged as the same pertain to the settling Defendants.

5. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

6. This action is dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs and Sanctions against Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

7. This amended order of dismissal with prejudice is filed to clarify the terms and conditions of the original Order of Dismissal with Prejudice previously filed on the 5th day of November, 1993.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the above findings be and are hereby made the order and judgment of this Court.

Dated this ___ day of January, 1994.

DISTRICT JUDGE

STATE OF OKLAHOMA
DISTRICT COURT IN & FOR
TULSA COUNTY, OKLAHOMA

ORDER

On this 24th day of March, 1994, the following matters in the designated cases came on for decisions, pursuant to the Rules of the District Court for Tulsa County. The Clerk of the Court is directed to notify counsel of record of the indicated decisions by mailing a copy of the ORDER to them and filing a copy of the ORDER in each case.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CJ-90-3403 WARNER, ET AL. V HILLCREST, ET AL.
CJ-91-2677 LEVITT, ET AL. V HILLCREST, ET AL.
CJ-93-2879 WILKINSON & MONAGHAN V WILLA WARNER, ET AL.

Law Firm's application to disqualify Judge Peterson from further proceeding in or the adjudication of pending applications for costs, fees and sanctions totaling $710,084.52 is denied. Failure to comply with Rule 15 (a).

IT IS THE COURT'S INTENTION TO CONCLUDE THESE CASES AS COMPLETELY AS POSSIBLE BEGINNING AT 9:30 A.M. ON MARCH 29, 1994 AND CONTINUING FROM DAY TO DAY, IF NECESSARY.

Notice mailed to: Karen Callahan, Bill Wilkinson, Mike Hill, Gary Davis, John

Paul, Mike Atkinson, Bill Sellers, Joe Best, Tony Jack Lyons.

AFFIDAVIT OF MAILING

I hereby certify that I have this 24th day of March, 1994 mailed a true and correct copy of the above decision(s) as ordered by the Court, and a true and correct copy was filed in each of the above foregoing cases.

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett
Deputy Court Clerk

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

(Filed Nov. 20, 1995)

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

83,555 WILLA WARNER, et al., Plaintiffs, v. HILLCREST MEDICAL CENTER, et al., Defendants, and HILLCREST HEALTHCARE CORPORATION, et al., Appellees, and WILKINSON AND MONAGHAN, et al., Appellants.

Appellants' and Appellees' Petitions for Rehearing are denied.

84,128 THE STATE OF OKLAHOMA, ex rel. ROBERT E. CHRISTIAN, District Attorney of the Sixth Prosecutorial District, Appellee, v. ONE BLACK LEFT-HANDED VEHICLE DOOR, ONE BLACK RIGHT CHEVROLET SUBURBAN DOOR, et al., Appellant.

Appellant's Petition for Rehearing is denied.

84,812 IOOF INCORPORATED, and STATE INSURANCE FUND, Petitioners, v. CLYDE W. WIMSETT and THE WORKERS' COMPENSATION COURT, Respondents.

Petitioners' Petition for Rehearing is denied.

Respondents' Motion for Costs and Attorney Fees is denied.

Done in conference this 16th day of November, 1995.

/s/ Jerry L. Goodman
JERRY L. GOODMAN
Presiding Judge
Court of Appeals, Division 4

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

WILLA WARNER et al., Plaintiffs, v. HILLCREST MEDICAL CENTER et al., Defendants, and HILLCREST HEALTHCARE CORP. et al., Appellees, v. WILKINSON and MONAGHAN, and BILL V. WILKINSON, Appellants.	)	No. 83,555 (Filed Apr. 1, 1996)

ORDER

Appellants' Petition to Review Order Denying Disqualification is entertained. The Court of Appeals' Order Denying Motion to Disqualify is left undisturbed. The Statement of Amicus Curiae is accepted as filed on December 8, 1995. The Petition for Certiorari filed by the appellants and the Petition for Certiorari filed by the anesthesiology appellees are both denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 1st DAY OF APRIL, 1996.

/s/ Alma Wilson
CHIEF JUSTICE

Concur: HODGES, HARGRAVE, OPALA, SUMMERS, JJ., and Judge Rita Strubhar, Special Justice, sitting by designation for Kauger, V.C.J., who recused.

Dissent: WILSON, C.J., LAVENDER, SIMMS, WATT, JJ.